79-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

BOARD OF TRUSTEES OF PICKENS COUNTY SCHOOL DISTRICT, ET. AL.,

Petitioners,

versus

ANN MITCHELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioners, the Board of Trustees of Pickens County School District and Dr. Curtis A. Sidden, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported and appears in Appendix A hereto. The opinions of the District Court for the District of South

Carolina are unreported and appear in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 25, 1979. On June 8, 1979, the petitioners filed a Petition for Rehearing with the Court of Appeals. The Court of Appeals entered its Order denying the Petition for Rehearing on June 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an employer sued for alleged sex discrimination under Title VII of the Civil Rights Act of 1964 must do more than "articulate some legitimate nondiscriminatory reason" for refusing to renew an employment contract in order to rebut a pregnant employee's prima facie case, when the trial court found as a fact that the challenged employment practice impacts equally on men and women?

2. Whether a prima facie case of sex discrimination can be established by "judicial notice" of the "potential" effect of an employment policy when there is no showing of an actual or statistical disparity in the impact of the policy on men and women and the trial court found the policy to be neutral on its face, neutral in intent, and neutrally applied to both men and women?

STATUTES INVOLVED

Sections 703(a) (1) and (2) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2 (a) (1) and (2), provide:

> It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of su individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This case involves a claim by a female school teacher, Ann Mitchell, that her employer, the School Board of Pickens County, South Carolina, discriminated against her on the basis of sex when it refused to renew her annual teaching contract for the 1972-1973 school year. The action was commenced in 1972. Changing Title VII law has protracted the litigation for seven years and led to shifting theories of the plaintiff's case.[1] In the decision now on appeal, the district court, relying on this Court's opinion in *General Electric Co.* v. *Gilbert*, 429 U.S. 125

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[1] The action was originally based on alleged violations of the Fourteenth Amendment and 42 U.S.C. § 1983. The district court dismissed the original action on the authority of the Fourth Circuit's decision in *Cohen* v. *Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973) (en banc). Pending appeal of the original action, Mitchell commenced a second action in the district court based on Title VII, which Congress had amended in 1972 to cover governmental employers. After this Court reversed *Cohen* in *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1972), the Fourth Circuit vacated the judgment of the district court in Mitchell's original action and remanded for further proceedings in light of *LaFleur*. On remand the original suit was consolidated with the Title VII suit. In the decision now on appeal the district court held that no statutory or constitutional violations had been established. The court of appeals reversed on Title VII grounds without reaching the constitutional question.

(1976), held that Mitchell failed to establish a prima facie case of sex descrimination under Title VII and dismissed the suit. (App. B, *infra*, 23b). Pending Mitchell's appeal from the district court, this Court decided *Nashville Gas Co.* v. *Satty*, 434 U. S. 136 (1977). Relying on *Satty*, the court of appeals held that Mitchell did establish a prima facie case of adverse impact and reversed and remanded to the district court for consideration of any "business necessity" defense the School Board might present under the Fourth Circuit standard of *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971). (App. A, *infra*, 12a). After briefing and argument in the court of appeals, this Court decided *Furnco Construction Co.* v. *Waters*, ___U.S.___, 98 S. Ct. 2943 (1978), *Board of Trustees of Keene State College* v. *Sweeny*, ___U.S.___, 99 S. Ct. 295 (1978), and *New York City Transit Authority* v. *Beazer*, ___U.S.___, 99 S. Ct. 1355 (1979). None of these decisions was considered by the court of appeals in its opinion. On the basis of these three cases, the School Board petitioned for a rehearing in the court of appeals. Rehearing was denied.

The essential facts are set forth in the opinion of the district court. Since at least 1958 (A. 120),[2] the Pickens County School District has followed a policy of not offering an annual teaching contract[3] to a person if "the applicant would not commit himself for the full academic year or it was anticipated the applicant would not be able to work

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[2] "A" references are to the joint appendix filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

[3] Public school teachers in South Carolina are employed by local school districts on a year-to-year basis. The teacher's contract expires each year, so that a new contract must be agreed on for the following year. See *Rackley* v. *School District No. 5*, 258 F. Supp. 676, 683 (D. S.C. 1966). See also A. 122.

the full contract year." (App. B, *infra*, 6b). Both the district court and the court of appeals found this policy to be sex-neutral on its face and as actually applied by the School District. (App. B, *infra*, 21b; App. A, *infra*, 9a). Men and women alike have been refused teaching contracts on the basis of the policy without regard to the cause for their anticipated absences. (App. B, *infra*, 6b). The reason behind the policy is to avoid foreseeable disruptions of instructional continuity for the students. (App. B, *infra*, 16b).[4] Mitchell was the first pregnant woman to whom the policy had been applied. (A. 155-156).[5]

In addition to this longstanding "anticipated absence" policy, the 1971-72 Teacher's Manual contained a rule requiring teachers to give notice to the principal when they would be absent from school "for any reason." (A. 55).[6]

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[4] This Court recognized in *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 641 (1974) that preserving continuity of classroom instruction is a "significant and legitimate educational goal."

[5] Other teachers who were known to be pregnant at contract renewal time were offered contracts for the following academic year. In each case no interruption of classroom teaching was anticipated, distinguishing these cases from Mitchell's. (A. 159, 160, 167, 169).

[6] The full text of the notification rule is as follows:

> Notification of Principal
>
> When it is necessary that a teacher be absent from school for any reason, he notifies his principal, who secures a substitute from a list of approved substitutes furnished by the Director of Personnel. The principal is obligated to secure the most suitable substitute available.

(A.55). An additional difficulty in Mitchell's case was that a suitable substitute was not available to replace her during her six-week absence. The substitute proposed by Mitchell was not certified to teach Spanish. (A. 191). The district court noted that Mitchell's principal attempted to hire a certified Spanish teacher for the first semester only, so that Mitchell could return the second semester. (App. B. *infra*, 16b). He was unable to work out a suitable arrangement with a certified teacher.

This was the only notification requirement in the Teacher's Manual. It applied to all teachers regardless of sex.[7]

Mitchell was employed by the School Board to teach high school Spanish for the 1971-1972 school year. (App. B, *infra*, 4b). She undertook the assignment in August 1971 and completed the entire school year. (A. 122-123). She was an excellent teacher. (App. B, *infra*, 4b). In April of 1972, prior to the proffer of contracts for the 1972-1973 school year, Mitchell learned that she was pregnant and informed her school principal that her expected date of delivery was November 6, 1972. She further advised her principal that she wished to have her contract renewed for the 1972-1973 school year with the understanding that she be given an excused absence from November 1, 1972, until the recommencement of school following the Christmas holidays on January 2, 1973. (App. B, *infra*, 4b ; A. 212-215). This amounted to an anticipated absence from the classroom of over one third of the first semester, which was to end on January 16, 1973 (App. B, *infra*, 4b).

Although Mitchell's principal did not object to her

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[7] The court of appeals made no mention of this sex-neutral notification policy in its opinion, apparently, because it was unaware of its existence. Instead the court of appeals focused on another policy in the Teacher's Manual dealing with termination of pregnant teachers already under contract when the principal deemed their presence to be "detrimental to the satisfactory operation of the school program." (A. 57.). The school superintendent testified without contradiction that this "pregnancy" policy applied to termination of existing contracts and was neither relevant to nor relied upon in Mitchell's case. (A.123-124, 207-208, 215-216). He informed Mitchell that the decision in her case was based on the "anticipated absence" policy, not the "pregnancy" policy, when she came to see him about her situation. (A. 123-124). The district court made a specific finding of fact that Mitchell was not offered a contract on the basis of the "anticipated absence" policy. (App. B, *infra*, 16b). This finding was left undisturbed by the court of appeals.

proposal, he informed her that such an arrangement would be contingent upon the approval of the district superintendent, Dr. Sidden. (App. B, *infra*, 4b-5b). The superintendent did not approve the plan. Instead, in accordance with the district's longstanding practice of not renewing a contract when it was anticipated the teacher would not teach a full, uninterrupted school year, he recommended that the School Board not offer Mitchell a contract for the ensuing year. (App. B, *infra*, 5b). After a hearing on the matter, the School Board accepted the superintendent's recommendation. (App. B, *infra*, 5b).

The district court found as a fact:

> The reason defendants did not renew or offer to renew plaintiff's contract for the fall semester of school year 1972-73 or the entire school year 1972-73 was because they believed a predicted long period of absence from the classroom would break the continuity of teaching for the students.

(App. B, *infra*, 16b). The court specifically stated that "defendants did not intend to discriminate against the plaintiff because of her sex." (App. B, *infra*, 9b). It also specifically found:

> [D]efendants' actions in this case were made in good faith with the legitimate interests for the educational system and its students in mind. It was the wish of the defendants to return plaintiff to her teaching responsibilities as soon as such could be accomplished with minimal disruption of instructional continuity.

(App. B, *infra*, 16b).[8]

Despite these findings of fact, the district court initially entered judgment for Mitchell in the case. It did so on

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[8] As noted above in footnote 5, the school authorities attempted to work out an arrangement whereby Mitchell could resume teaching Spanish at the beginning of the second semester. They also offered to return her to teaching as a reading instructor at the beginning of the

(*cont.*)

the basis of the Fourth Circuit's decision in *Gilbert* v. *General Electric Co*, 519 F.2d 661 (4th Cir. 1975), reversed 429 U. S. 125 (1976). Reasoning that the "anticipated absence" policy, although facially neutral, had the forbidden, albeit unintended, consequence of denying Mitchell employment solely because of her pregnancy, the court concluded that a prima facie showing of discriminatory treatment was established.[9] It then reasoned that since the policy had not been shown to be "necessary to the normal operation of a school," the Board had failed to rebut the prima facie case.

When this Court reversed in *Gilbert*, the district court withdrew judgment for Mitchell and entered judgment for the Board. The court now reasoned that, although the anticipated absence policy precluded Mitchell from the benefit of re-employment, no sex related distinctions were drawn by a policy which was "applicable to all absences, whether gender related physical disability ones or not."

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8 (*cont.*)
second semester, but she refused this offer. (App. B, *infra*, 16b). The district court found as a fact that "[i]t was the wish of the defendants to return plaintiff to her teaching responsibilities as soon as such could be accomplished with minimal disruption of instructional continuity." (*Id.*). The record reflects that similar arrangements had been made for pregnant teachers in the past. (A. 169).

9 Conclusions of Law 3 and 5 of the district court's opinion disclose that the analysis was that of "disparate treatment" rather than "disparate impact." In Conclusion 3 the court indicated that the gravamen of the Title VII violation was the individual denial of a contract to Mitchell because of *her* pregnancy. In Conclusion 5 the court, quoting the Fourth Circuit *Gilbert* decision, stated the controlling principle of law as follows:

> "The legislative purpose behind Title VII was to protect employees from any form of *disparate treatment* because of race, color, religion, sex or national origin or, as one commentator has stated it, 'to make employment decisions sex-blind, as well as color blind'."

(App. B, *infra*, 10b) (emphasis added).

(App. B, *infra*, 23b). Going beyond the policy's facial neutrality, the district court explicitly concluded that Mitchell failed to prove any gender based effect of the policy. The district court found the mere showing that the policy was applied to Mitchell's pregnancy insufficient to prove disparate impact, since the policy would be applied equally to men with uniquely male related physical conditions such as prostatic malfunction. (App. B, *infra*, 22b).[10] The district court, therefore, concluded that neither gender based discrimination (disparate treatment) nor gender based effects (disparate impact) had been shown within the meaning of *Gilbert*.

In reversing, the court of appeals drew a sharp distinction between 703(a) (1) and 703(a) (2). (App. A, *infra*, 9a). It reasoned that the district court, without the benefit of this Court's decision in *Satty*, had misinterpreted 703(a) (2) as it applies to "disparate impact" cases under Title VII. (App. A, *infra*, 8a). Conceding that no disparate impact was established by the "actual consequences" of the Board's policy, the court nevertheless reasoned that the "potential" effect of the policy would impact disproportionately on women in violation of 703(a) (2).[11] On remand, it instructed the district court to

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10 The court of appeals did not hold this finding of fact to be clearly erroneous, but instead agreed it was factually inferable that a male with a comparable anticipated absence "would similarly have been denied renewal of contract." (App. A, *infra*, 9a).

11 For reasons inexplicable on the basis of the evidentiary record and the fact findings of the district court, the court of appeals assumed that the School Board had a policy of *compelled* disclosure of anticipated absence by women, but *voluntary* disclosure by men. No such policy existed. As already noted above at footnote 5, the Board's notification policy applied to absence "for any reason." Mitchell neither claimed nor adduced evidence at the trial level that the notification policy was voluntary for men; and the district court made no finding of fact to that effect.

enter judgment for Mitchell unless the School Board rebutted her prima facie case by a showing of "business necessity." (App. A, *infra*, 12a).

REASONS FOR GRANTING THE WRIT

This case raises important issues concerning the proper interpretation of Section 703(a) (2) of Title VII of the Civil Rights Act of 1964, as amended. The opinion below conflicts with decisions of this Court and of other circuits with regard to the showing an employer must make to rebut a prima facie case of Title VII discrimination. The decision, if left undisturbed, will have a substantial impact on both public and private employers in this country, because it requires a manifestly job-related policy, concededly neutral on its face, neutral in its intent, and neutral in its application to men and women alike to be justified by proof of "business necessity." Such a rule conflicts directly with this Court's repeated holding that, in the absence of proof of adverse impact, an employer need only articulate "some legitimate nondiscriminatory reason for the employee's rejection to dispel the inference arising from a prima facie case." *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973). If allowed to stand, the decision below will cast lower federal courts in the role of a managerial elite imposing their own views of proper personnel policies rather than a judiciary determing whether an employee has actually been discriminated against because of race, sex, or other legally prohibited classifications. Title VII employers will be exposed to potential pecuniary liability for management practices which are job-related, facially neutral, nondiscriminatory in intent, and applied equally to men and women, simply because they happen to be applied to a pregnant woman in a particular case.

The decision below also adds to the general confusion

over what constitutes a prima facie case of disparate impact after *Gilbert-Satty*. That question is presently pending in a large number of cases in the lower federal courts. The decision below, holding that "potential" impact is sufficient to make out a prima facie case even though the trial court found no actual or statistical impact falling more heavily on women than men, obliterates the distinction between a prima facie case of "disparate treatment" and "disparate impact" found in decisions of this Court. See *Teamsters* v. *United States*, 431 U. S. 324 (1977); *Furnco Construction Co.* v. *Waters*, *supra*. This controversy over the proper interpretation of an important federal statute can and should be authoritatively settled by this Court in the present case.

I.

> *Where the trial court finds as a fact that an employment practice impacts equally on men and women, the employer need only articulate some legitimate, nondiscriminatory reason for the practice to rebut the employee's prima facie case; there is no further requirement that the employer prove the practice is based on "business necessity."*

This case, like *Furnco* and *Sweeny* before it, exemplifies the continuing confusion in lower federal courts over the showing an employer must make to rebut a prima facie case under Title VII. The employer's burden depends, of course, on whether the employee makes a prima facie showing under the "disparate treatment" theory of *McDonnell Douglas Corp.* v. *Green* 411 U.S. 792 (1973) or the "disparate impact" theory of *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). The present case does not involve employment tests, as did *Griggs*, nor particularized physical requirements, as did *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). Rather, it concerns a general policy applicable to anticipated absences of either sex for any reason.

In the present action the district court made a specific finding that Mitchell proved no disparate effect of this "anticipated absence" policy as between men and women with gender specific physical conditions. The court also found the policy had been equally applied to both men and women for reasons unrelated to a gender specific physical condition.[12] Neither of these findings was held to be clearly erroneous by the court of appeals. *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100 (1969).

On these facts it was not open to the court of appeals to treat the case as controlled by the "business necessity" test in determining the School Board's burden of rebuttal.

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[12] The district court found disparate impact in neither its first or second opinions on the merits. In the first opinion, decided in Mitchell's favor, the court's holding was bottomed on a finding of "disparate treatment," so the court did not reach the question of "disparate impact." However, the court stated *obiter dictum*:

> The fact defendants denied plaintiff employment because of her pregnancy is the key to this case because that condition is so much a part of womanhood. Most other physical conditions are shared by men and women alike, in which case plaintiff would be precluded from asserting discrimination based on sex. The Court recognizes that there are physical conditions unique to men, such as a malfunction of the prostate gland. If plaintiff were a male who was not rehired because of an anticipated prostate operation, discrimination based on sex might still be argued.

The reason the court concluded Mitchell had established a prima facie case of sex discrimination is made clear by this passage. The court thought any employment decision based on a gender specific physical condition was "discrimination based on sex" whether a man or a woman was involved. The key in the court's mind was not that men and women were affected differently by the policy, but that it applied to gender specific conditions. The court admitted that "[s]ince individuals of both sexes can suffer physical conditions unique to the sex [there is] logic in the position that neither should be allowed to assert discrimination on the basis of sex." However, it was bound by the Fourth Circuit's holding in Gilbert at the time and could not, consistent with that case, solve the riddle of gender specific reasons for anticipated absences.

At most, Mitchell showed that, because the decision not to renew her individual contract was based on the gender specific condition of pregnancy, she received "disparate treatment."[13] Thus, the appropriate analysis for determining the burden of rebuttal on the School Board was the "legitimate nondiscriminatory reason" test of *McDonnell Douglas*.

In effect, the court of appeals' decision to require a showing of "business necessity" returns the Fourth Circuit to the "single exception" theory of Title VII enunciated by that court in *Gilbert* v. *General Electric Co.*, 519 F.2d 661, 667 (4th Cir. 1975):

> Title VII . . . authorizes no . . . "rationality" test in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in conditions of employment. It is not concerned with whether the discrimination is invidious or not.
>
> * * * *
>
> It authorizes but a single exception to this statutory command and that is a narrow one which to be upheld, requires a finding that it is "necessary to the safe and efficient operation of the business." *Robinson* v. *Lorillard Corporation*, (4th Cir. 1971) 444 F.2d 791, 798, *cert. dis.* 404 U.S. 1006 . . . .[14]

Under this theory a prima facie case may be rebutted only by a showing of "business necessity"—there is no

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[13] The School Board agrees with the district court that on the facts presented Mitchell failed to establish a prima facie case of "disparate treatment."

[14] This theory of Title VII is erroneous not only in light of this Court's reversal in *Gilbert* itself, but also in light of this Court's decisions in *Furnco* and in *United Steelworkers* v. *Weber*, ___U.S.___, 99 S.Ct. 2721 (1979).

other test. Of course, such a theory cannot stand after *Furnco.*

The decision below also brings the Fourth Circuit into conflict with other courts of appeals. In *Chalk* v. *Secretary of Labor*, 565 F.2d 764 (D.C. Cir. 1977), cert. denied ____U.S.____, 98 S. Ct. 1527 (1978), the District of Columbia Circuit rejected the precise position taken by the court of appeals in this case. The *Chalk* court held:

> In a Title VII action, the initial burden of proof is on the plaintiff to establish a prima facie case of discrimination. Thereafter, it shifts to the defendant to show a legitimate nondiscriminatory reason for its actions. The burden is then upon the plaintiff to prove that this reason is just a pretext.
>
> * * * *
>
> The appellant erroneously states the showing a defendant must make to rebut a prima facie case of discrimination. It is not necessary to show a "legitimate business necessity" for not hiring the appellant, as he argues; rather, the defendant need only "articulate some legitimate, nondiscriminatory reason" for not doing so.

565 F.2d at 766, 767 (citations and footnotes omitted).

This Court did not specifically address the "business necessity" test in either *Furnco* or *Sweeny*. The present case offers the opportunity to clarify and refine its previous Title VII decisions on this important point. The conflict in the lower courts can thereby be resolved.

II.

> ***The essence of a Title VII violation is discrimination in fact; and where the plaintiff fails to establish a prima facie case by adducing evidence of the actual or statistical impact of an employment practice on women, a court cannot cure the deficiency in proof by substituting its speculative view of the "potential" effect of the policy for the missing evidence of disparate impact in fact.***

In the instant case Mitchell was unable to show that the Board's anticipated absence policy, although facially neutral, worked "*in fact* disproportionately to exclude women from eligibility for employment." *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977) (emphasis added). During the fifteen or more years of its operation, Mitchell herself was the only pregnant woman to be refused a contract under the policy.[15] Thus, there was no evidence that the policy, in actual operation, had the systematic effect of disproportionately screening out pregnant women. Furthermore, Mitchell introduced no statistics to demonstrate that the incidence of pregnancy in either the national population in general[16] or the relevant employment pool in particular[17] was such that the policy would exclude a significantly higher proportion of women than men from obtaining contracts. Even the "weak" statistical showing made in *New York City Transit Authority* v. *Beazer*, *supra*, was lacking below, for Mitchell chose to introduce no statistics at all on the question of disparate impact. On this state of proof, the district court correctly held that no prima facie case of gender based effects had been established. The court of appeals, as a result of misplaced reliance on this Court's decision in *Satty*,

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[15] Mitchell claims that the policy was also applied to two other women in the spring of 1971. However, the undisputed testimony of the school superintendent indicates that neither woman applied for a new contract with the school district. (A.147). Since the two did not seek new contracts, there was no question of the school district either refusing or agreeing to hire them.

[16] See *Dothard* v. *Rawlinson*, 433 U. S. 321, 330-331 (1977).

[17] See *Hazelwood School District* v. *United States*, 433 U. S. 299, 308, nn. 13, 14 and accompanying text (1977).

reached the opposite conclusion.[18]

The court of appeals itself recognized that the sparseness of Mitchell's evidentiary case presented "a record in which the universe of persons potentially affected and those actually affected by the challenged policy did not permit the sort of reliable statistical proofs of actual consequences frequently available and useful in disparate impact cases." (App. A, *infra*, at 6a). In the absence of direct or statistical proof that the *actual* consequence of the policy was to impose on women a burden that men need not bear, there was no basis for the court of appeals to find a prima facie case. It is one thing to say that statistical proofs are "not indispensible to proving the disparate impact *prima facie* case," and quite another to relieve a plaintiff entirely of her burden of showing that disparate impact exists in fact. The court of appeals in effect interpreted *Satty* as holding Section 703(a) (2) requires no evidence that a challenged employment policy in fact has a disparate impact if it is applied to a pregnant woman; a prima face case is established if the court takes "judicial notice of the world as it is" and concludes that a

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[18] As a practical matter, if the court of appeals were correct in its reading of *Satty*, Title VII would require pregnancy to receive special, favorable treatment accorded to no other type of physical condition or disability. Any doubt concerning the intent of Congress in this respect has been dispelled by the 1978 amendment of Title VII. P.L. 95-555, 92 STAT. 2076 (1978). Section 701(k) now provides in pertinent part:

> . . . women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .

The School Board's anticipated absence policy treats pregnant women precisely the same as other persons not affected by pregnancy "but similar in their inability to work."

"potential" for disparate impact exists.[19]

This view overlooks the cricital importance of proof in establishing a prima facie case. It also ignores important differences between *Satty* and the instant case in the proof actually adduced. In *Satty* the asserted facially neutral policy had never been applied to any cases other than pregnancy.[20] In this action, the district court found the challenged policy had been applied to cases not involving pregnancy.[21] In *Satty* the employer did not so much as attempt to claim that its policy requiring forfeiture of accumulated job-bidding seniority was job-related to Satty's position as an accounting clerk.[22] In this case, the

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[19] A sounder analysis of the approach to be taken in determining whether a prima facie case had been established was outlined by the Fourth Circuit in another Title VII decision, *Roman* v. *ESB, Inc.*, 550 F.2d 1343 (4th Cir. 1976) (en banc). In *Roman* the court stated:

> The district court especially noted that the office force and the supervisory and salaried positions might arouse suspicion and that on a different record a finding of discrimination might be justified. But the court properly decided the case on the record before it, not its suspicions.
>
> * * * *
>
> More importantly, what glares from the record is the failure of the plaintiffs to develop evidence of any consequence as to those parts of the employment situation at ESB . . . which may arouse suspicion.

550 F.2d at 1351, 1356. The *Roman* court also observed that the *absence* of evidence of discriminatory impact should be considered in determining whether a prima facie case has been made just as the *presence* of evidence should be considered in arriving at the same conclusion. We submit that the absence of any hard evidence of disparate impact, statistical or otherwise, is especially significant in evaluating Mitchell's proof in the present case.

[20] See *Nashville Gas Co.* v. *Satty*, *supra*, at 434 U. S. 140, n.2.

[21] See App. B, *infra*, at 6b .

[22] See *Nashville Gas. Co.* v. *Satty*, *supra*, at 434 U. S. 143, n.5 and accompanying text.

employer has established a manifest relation between its policy of denying contracts to teachers it knows cannot teach for a full, uninterrupted school year and the "significant and legitimate educational goal" of continuity in classroom instruction. *Cleveland Board of Education* v. *LaFleur*, *supra*, at 441 U.S. 641.

The court of appeals concluded that a prima facie case existed as a matter of abstract, *a priori* reasoning rather than on the basis of the facts found by the district court. Its decision represents a significant departure from the analysis of disparate impact implicit in the prior opinions of this Court. If its decision is allowed to stand, further confusion as to the standard for establishing a prima facie case of disparate impact will be engendered in the lower courts.

In *McDonnell Douglas* v. *Green*, *supra*, this Court set forth the particular elements of proof which constitute a prima facie showing of discriminatory *treatment* under Title VII. Prior decisions of this Court contain no similar explication of the discrete elements needed to establish a prima facie case of disparate *impact*. The present appeal offers the Court an opportunity to provide the same authoritative guidance for this area of Title VII law as it did recently for the law of jury selection in *Duren* v. *Missouri*, ____U.S.____, 99 S. Ct. 664, 668-670 (1979). There is little significance to the requirement that a Title VII plaintiff establish a prima facie case of discrimination, if no more is necessary than the meager evidence presented by Mitchell in this case.

CONCLUSION

For the reasons above stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 1979.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2385

ANN MITCHELL,
Appellant

versus

BOARD OF TRUSTEES OF PICKENS
COUNTY SCHOOL DISTRICT A.
Appellee

Appeal from the United States District Court
for the District of South Carolina, at Anderson
Robert F. Chapman, District Judge

Argued November 13, 1978 Decided May 25, 1979
Before HAYNSWORTH, Chief Judge
PHILLIPS, Circuit Judge and
Walter E. HOFFMAN, Senior District Judge,
sitting by designation.

PHILLIPS, Circuit Judge:

This appeal presents the question whether a school board's policy that required a pregnant teacher to report her pregnancy to school officials immediately upon its discovery, and then used the disclosed pregnancy as the sole basis for declining to renew her contract for the succeeding school year violated § 703(a) (1) or (2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2002e-2(a) (1) and (2). The district court held, relying essentially on *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), that it did not. In light of *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977) decided during the pendency of this appeal, we reverse and remand.

The instant case presents another classic illustration of the difficulty wryly observed by Mr. Justice Powell in *Satty* that has attended the best efforts of parties and courts to bring Title VII lawsuits to final resolution during a recent past characterized by a "meandering course" of adjudication in which both parties and lower courts have often "proceeded on what was ultimately an erroneous theory of the case." *Id.* at 148 (Powell, J., concurring). Whatever the frustrations for both parties and courts during such a period of necessarily laborious working-out of important national policy through the judicial process, a patient faithfulness to the imperatives of that process binds us to the course. For reasons that will appear, this requires at least one more meander for this case before it may finally come to rest.

I.

Ann Mitchell was a state-certified high school Spanish teacher in the Pickens County School District, South Carolina, for the school year 1971-72. There is full agreement that her work was of the highest quality. In February 1972, she signed a letter of intent relating to the renewal of her contract for the school year 1972-73. In

April 1972, she discovered she was pregnant with anticipated delivery in November 1972. As required by the school district's regulations she gave notice of this fact to the school administration.[1] While the notification requirement critical to this regulation is literally related to "termination" of ongoing contracts rather than to "nonrenewal" of contracts for succeeding years, the duty to notify is literally addressed to any teacher "under contract" who determines she is pregnant. There is no question on the record of its intended application to Mitchell's determination and discloslure of her pregnancy; and of course both she and the board so acted upon it, with the results that gave rise to this litigation. This regulation was revoked by the school board during this litigation.

Thereafter, Mitchell made tenative arrangements to have a teacher serve as a substitute for the six weeks anticipated leave. This plan was disapproved by the Superintendent and as a result Mitchell's contract was not renewed. The Board of Trustees ultimately upheld the Superintendent's decision, applying an "unwritten policy" against renewing the contract of any teacher who at renewal time could not commit to a full-year's service.

In August 1972, Mitchell brought suit against school officials under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, alleging violation of her federal constitutional rights by the nonrenewal of her contract. On April

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[1] The teacher's Manual provided as follows:

> The principal of the school shall decide when the presence of a pregnant woman (teacher, student, or employee) is detrimental to the satisfactory operation of the school program. In all cases of maternity, women who are under contract with the Board of Trustees must in writing apply to the principal of the school or immediate superior official for termination of contract as soon as pregnancy is determined. This termination should take effect not less than three (3) months prior to expected delivery date. Exceptions must be approved by the District Superintendent.

4, 1973, the district court gave summary judgment for the school officials on the authority of this Court's then recent decision in *Cohen* v. *Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973) (en banc), *rev'd sub nom. Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). Mitchell appealed that judgment to this Court and while the appeal was pending filed a second action stating essentially the same claim under Title VII. After the Supreme Court's LaFleur decision reversed this Court's decision in *Cohen*, we vacated the district court's decision in the § 1983 action and remanded for further proceedings. Upon remand the district court consolidated the two actions on the basis of an amended complaint stating both claims. After discovery, the case was submitted for decision by the court upon the pleadings, depositions, and various affidavits.

Relying essentially on this Court's then recent decision in *Gilbert* v *General Electric Co.*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976); on *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); and on applicable EEOC guidelines, the district court made findings of fact from which it concluded that, although facially neutral, the Board's policies had the forbidden consequence, albeit unintended, of sex-related discrimination, and so violated *prima facie* Mitchell's rights under Title VII. Concluding also that the policies had not been shown "necessary to the normal operation of a school," the district court on January 22, 1976 entered judgment awarding back pay and attorney's fees to Mitchell.[2] Defendants filed notice of

[2] The court deliberately avoided ruling on the constitutional claim, and it has technically never been determined. Although plaintiff originally sought injunctive relief, back pay and reinstatement, and attorney's fees, she later abandoned all claims for relief except a declaration of violation of rights, back pay for only that portion of the fall semester outside the maternity leave period requested, court costs and attorney's fees.

appeal from this judgment.

Because the Supreme Court's decision in *Gilbert* was then pending, docketing of defendant's appeal was deferred.[3] When the Supreme Court then reversed this Court's decision in *Gilbert*, the district court on July 27, 1977 "withdrew" its then extant judgment and entered a new judgment for the school official defendants. Leaving its findings of fact intact, the district court construed the Supreme Court's *Gilbert* decision to require different conclusions of law leading to a complete reversal of its pre-*Gilbert* judgment. At this point the school official defendants of course withdrew their appeal, and plaintiff Mitchell filed the appeal now before us.

II.

When the district court entered its original judgment for plaintiff on her Title VII claim, it correcty utilized the "disparate impact" analysis that originated in *Griggs* and had recently been applied by this Court in our *Gilbert* decision. Under this approach the court accurately identified the challenged policy; concluded that although facially neutral its consequences bore with disparate impact upon women; and held that not being shown "necessary to the normal operation of a school" it violated § 703(a) (1) and (2) of Title VII. The key to this analysis lay in the court's correct perception of the nature and scope of the policies under challenge.[4] As identified by the district court, the

[3] And "relief" from the January 22, 1976 judgment was granted under Fed. R. Civ. P. 60(b) (6) pending the *Gilbert* decision. We note the practice without approving it.

[4] That disparate impact analysis may well turn on the threshold identification of the nature and scope of the policy or practice being challenged, hence the "universe" of persons potentially and actually affected by it, *see General Electric Co.* v. *Gilbert*, 429 U.S. 125, 147-48 (1976) (Brennan, J., dissenting).

policy was that by which school board officials secured and used information provided them at contract renewal time that a teacher would likely experience during the ensuing school year an extended period of absence as a basis for declining to renew that teacher's contract. In assessing the consequential impact of this policy, the court had little direct evidence of specific applications. There was evidence from the school board that the policy had on several occasions been applied to deny renewal to persons who for various reasons unassociated with anticipated physical disability could not commit to full year employment.[5] Beyond these few instances, school officials testified that *if* they had been notified of any sorts of anticipated absences of extended duration comparable to those necessitated by pregnancy, these *would have been* treated comparably, but no specific instances were shown. On the other hand, the plaintiff could offer, in addition to her own case, only two other specific instances from the same school year in which advance notifications of pregnancy had resulted in non-renewal of contracts.[6] Thus the court was faced with a record in which the universe of persons potentially affected and those actually affected by the challenged policy did not permit the sort of reliable statistical proofs of actual consequences frequently available and useful in disparate impact cases. It had instead to proceed on the basis of the few specific applications of the policy proven, such inferences of likely other applications as these instances could rationally support, and judicial notice of the world as it is and as it is known in common

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[5] *E.g.*, spouse taking employment necessitating family relocation. Such information apparently came by voluntary disclosure or upon specific inquiry. None was officially compelled.

[6] And a school official concluded that he was "sure" there had been other cases.

experience to be. *See* Fed. R. Evid. 201.[7] On this record, the district court rightly concluded that a policy that arguably would not renew the contract of any teacher who for any reason could not commit at contract renewal time to a full year's uninterrupted serice, but that singled out pregnancy alone for compelled disclosure would necessarily impact disproportionately upon women. Because, as the district court put it, "defendants' actions . . . resulted in the denial of a teaching job to plaintiff solely because of pregnancy," *Griggs*' teaching, as then recently applied by this Court in *Gilbert*, was thought to compel the conclusion that the policy's "consequences," as experienced by Mitchell, constituted a *prima facie* violation of her Title VII employment rights.

Then followed the Supreme Court's decision in *Gilbert* that held the exclusion of pregnancy from a generally comprehensive employee disability insurance program not violative of § 703(a) (1) of Title VII. Confronted with this decision, the district court then concluded that its earlier disparate impact analysis that had relied heavily on this Court's *Gilbert* decision had been undercut. Basically, the district court now read the Supreme Court's *Gilbert* opinion to mandate for all Title VII cases the stringent constitutional standards for proof of discrimination that it had applied in such constitutional claim cases as *Geduldig*

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[7] Statistical proof of actual applications is not of course indispensable to proving the disparate impact *prima facie* case, particularly where, as here, the action is individual and not class. Circumstantial evidence, complemented by judicial notice to show that a facially neutral policy must in the ordinary course have a disparate impact on a protected group of which an individual plaintiff is a member is often utilized. *See, e.g., Nashville Gas v. Satty*, 434 U.S. 136 (1977). To require statistical proof involving a significant sample of actual applications of a policy to establish its disparate impact would always preclude the claim of a "first impactee." Title VII of course cannot be read to yield such a result.

v. *Aiello*, 417 U.S. 484 (1974), and that this Court had explicitly rejected for Title VII cases in our own *Gilbert* decision. On that premise the district court now concluded that "[*i*]n light of *Gilbert* and the statutory language it construed, the defendants' unwritten policy of the non-renewal of teacher contracts where a predicted period of absence is indicated, has not been shown to constitute gender-based discrimination or to be gender-based in effect."

Nashville Gas Co. v. *Satty*, 434 U. S. 136 (1977), decided during the pendency of this appeal, makes plain that, however understandably, the district court has read *Gilbert* too broadly, and that its first conclusion of a *prima facie* Title VII disparate impact violation was correct. *Satty*, holding violative of Title VII a facially neutral leave absence policy that without business necessity denied accumulated seniority to women on maternity leave while granting it for all other disability leaves, distinguished *Gilbert* on two major points. They also distinguish *Gilbert* from this case. Most importantly, the *Satty* Court pointed out that the *Gilbert* practice "merely refused to extend to women a benefit that men cannot and do not receive," while the *Satty* practice "imposed on women a substantial burden that men need not suffer." 434 U.S. at 142. Furthermore, this distinction was said to be "more than one of semantics," *id.*, and to be based upon the application of different sections of Title VII in the two cases. While § 703(a) (1), the Title VII section invoked in *Gilbert*, had been there held not to require that "greater benefits be paid to one sex or the other 'because of their differing roles' in 'the scheme of human existence,'" this did not mean that § 703(a) (2), the Title VII section invoked in *Satty*, could be read to "permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different

role." *Id.*[8]

Within the *Satty* analysis, as applied to the facts found by the district court in this case and undisturbed in its judgment before us, the defendants' policy as applied clearly also imposed upon women school teachers a substantial burden that their male counterparts need not suffer. Women teachers alone were required by regulation to give advance notice of any anticipated absence of extended duration during an ensuing year. While it may be factually inferable that any male whose comparable anticipated absence was voluntarily disclosed either by himself or others would similarly have been denied renewal of contract, no official obligation of disclosure was laid upon men, and the record is devoid of evidence that anticipated absences for reasons of physical disability were ever used to deny renewal to men. The policies in combination clearly deprived women, including this plaintiff, of an "employment opportunities" - renewal for another year - and "adversely affect[ed their] status as . . . employee [s]" "because of [their] sex" within the meaning of § 703(a) (2). The policy and its consequences in application are not only indistinguishable in substance from those held violative of § 703(a) (2) in *Satty*, but also from those found *prima facie* violative in *Pennington* v. *Lexington School District 2*, 578 F.2d 546 (4th Cir. 1978), another post-*Satty* decision of this Court.[9]

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[8] That there is a critical distinction between the intended coverage and the proof requirements of §§ 703(a) (1) and (a) (2) respectively was necessary to decision in *Satty*, where both a *Gilbert*-type exclusion of benefits and a *Griggs*-type imposition of burdens on a protected group by a facially neutral policies were involved.

[9] In *Pennington*, the policies in question, although different in literal formulation and in thrust of application, came in the end to essentially the same thing as those in the instant case. In *Pennington* a pregnant

(*cont.*)

III.

Finding a *prima facie* violation of § 703(a) (2) does not end the matter. It still lies with a defendant found in *prima facie* violation of that section to escape liability by showing "business necessity" as justification for the challenged policy. *See Pennington* v. *Lexington School District 2, id.*

Unlike the *prima facie* violation that we have found established, this issue cannot be resolved on the present record. The defendants have pressed throughout this litigation a justification type defense, but it is at least questionable on the record before us whether either they or the district court have fully apprehended it as the "business necessity" defense that originated with the "disparate impact" theory of recovery under § 703(a) (2). Rather, the defendants from the outset have considered that plaintiff's Title VII claims were claims requiring proof of constitutionally proscribed discrimination and consequently were subject to the defense of a "legitimate state interest." This defense they have sought to show in the state's educational interest in continuity of instruction. While the record is not perfectly clear on the point, it appears most likely that the district court has similarly assessed the defendant's justification defense in these

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9 (*cont.*)
teacher requested a 40-day maternity leave at the beginning of the next school year. This was denied on the basis of a written policy providing that, ordinarily, absences of 20 consecutive days' duration should be cause for termination, with reinstatement a matter of grace. The teacher was guaranteed instead reinstatement in the same or a comparable position no later than the first day of the school year following her certified physical fitness for full-time employment, and was in fact at that time reemployed teaching a different subject in which she was not as proficient. The evidence showed a consistent practice of reinstatement within the same year for other disabilities than pregnancy that led to absences of longer duration than 20 days.

terms.[10] In gauging the requirements of fairness on remand it is important to recall that, except for the brief interlude when plaintiff held the upper hand in district court prior to the Supreme Court's decision in *Gilbert*, defendants' view of the appropriate theory of this defense has been vindicated by the course of procedural developments in which this view has never been directly rejected by any court until this opinion.[11] We must concede that plaintiff might understandably and accurately complain that

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[10] As indicated earlier in this opinion, the district court's finding of non-justification that undergirded its later withdrawn judgment for plaintiff was stated in terms of a failure to show that the challenged policy was "necessary to the normal operation of a school." In context, it seems apparent that this was in turn based upon the court's perception that plaintiff's arrangement for a substitute teacher completely met any necessity to provide continuity of instruction, this being the legitimate state educational interest advanced by the defendants as justification. While the "business necessity" defense might be thought completely subsumed within the "legitimate state educational interest" defense plainly advanced by defendants and rejected by the district court, they are enough different in concept that we are not disposed to hold on this record that failure of proof of the latter necessarily precludes proof of the former. *Compare Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 650 (1974) (legitimate state interest) *with Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971) *and Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 797-99 (4th Cir. 1971) (business necessity).

[11] Plaintiff's first claim, on which defendants were the prevailing parties until *LaFleur* necessitated our remand, was a constitutional claim for which the state interest defense was indisputably the appropriate one. Subsequent litigation was entirely upon the Title VII claim added in the interim. On this, the plaintiff was briefly the prevailing party, but on the authority of our *Gilbert* decision later reversed. It was during this interval that the district court's finding of "non-necessity to the operation of a school" was in effect. Defendants never had a chance to challenge on appeal that finding of the district court because of the withdrawal of the judgment following the Supreme Court's reversal in *Gilbert*. From that point until this opinion was filed, the defense has not been in issue because the defendants have been the prevailing parties on a finding of no *prima facie* violation.

she has never been under any misapprehension about the correct theory of claim and defense for her § 703(a) (2) claim[12] and that defendants' failure to have perceived what she has perceived should yield the ordinary litigation result of waiver of the defense. However, given the course of Title VII doctrinal developments while this case has proceeded, we do not think it would be fair to foreclose defendants from presenting in the district court such business necessity defense as they may have now that the course of adjudication has revealed it as the appropriate justification defense. *See Nashville Gas Co.* v. *Satty*, 434 U. S. 136, 150-52 (1977) (Powell, J., concurring). Accordingly, as we did in *Pennington*, we remand for consideration of any business necessity defense that defendants' may be disposed and able to present on the existing or a reopened record. If this defense is not established, judgment should be entered for plaintiff on the basis of the *prima facie* violation found on this appeal.[13]

REVERSED AND
REMANDED.

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[12] Plaintiff's brief on this appeal maintained its consistent position that the Title VII claim can only be defeated by a showing of *Griggs*-type business necessity, and argued that on the facts of record defendants have failed to make the requisite showing. Defendants continued to rely in terms upon the legitimate state interest theory.

[13] Unless there are reasons not apparent of record, such a judgment would presumably include the award given in the withdrawn judgment of January 22, 1976, with such adjustment in costs and attorney's fees as the district court determines.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Civil Action No. 75-143

ANN MITCHELL, *Plaintiff,*

versus

BOARD OF TRUSTEES OF PICKENS COUNTY SCHOOL DISTRICT "A", A BODY POLITIC AND CORPORATE; DR. CURTIS A. SIDDEN, SUPERINTENDENT OF EDUCATION FOR PICKENS COUNTY SCHOOL DISTRICT "A", IN HIS OFFICIAL CAPACITY ONLY, AND THE FOLLOWING MEMBERS OF THE BOARD OF TRUSTEES: B. J. SKELTON, RAY YOUNGBLOOD, TOM HENDRICKS, GIBSON SHEALY, KEN SMITH, ALLISON DALTON, NANCY WELBORN, DAN WINCHESTER AND GEORGE C. HAGOOD, IN THEIR RESPECTIVE OFFICIAL CAPACITIES ONLY AS MEMBERS OF SUCH BOARD; ALL OF THE ABOVE JOINTLY AND SEVERALLY SUED, *Defendants.*

ORDER

Plaintiff brought this action because defendants, when informed of plaintiff's pregnancy, failed to rehire or to renew plaintiff's teaching contract for the entirety of the 1972-73 school year, allegedly in violation of her rights secured by the Constitution of the United States and the Civil Rights Act of 1964, as amended.

The amended complaint in this case contains two causes of action which were the basis of two prior actions. Civil Action 72-1123 was an action by plaintiff alleging constitutional infringements cognizable under 42 U.S.C. § 1981 and § 1983. Relying largely on the en banc decision by the Fourth Circuit Court of Appeals in *Cohen* v. *Chesterfield County School Board*, 474 F.2d 395 (1973) this Court

granted defendants' motion for summary judgment and plaintiff filed a notice of appeal on April 30, 1973. On May 30, 1973, plaintiff commenced Civil Action No. 73-634 alleging substantially the same facts but envoking the jurisdiction of the court pursuant to Title VII of the Civil Rights Act of 1964, specifically 42 U.S.C. § 2000e-5. By order filed October 31, 1973, this Court denied defendants' motion to dismiss Civil Action No. 73-634 finding that Civil Action 72-1123 was not res judicata. Subsequently, the Fourth Circuit ordered that the appeal of Civil Action 72-1123 be held in abeyance pending the Supreme Court's decision in the *Cohen* case, and this Court ordered that Civil Action 73-631 also be held in abeyance pending that decision. On August 2, 1974 the Fourth Circuit vacated and remanded this Court's decision in Civil Action 72-1123. In light of those developments, this Court, on January 24, 1975, approved and signed a consent order pursuant to which plaintiff filed her amended complaint, commencing the action now before the Court, which essentially joins Civil Action 72-1123 and Civil Action 73-634 in one complaint. The consent order further provided that upon termination of a reopened discovery period, the case would be submitted to the Court upon the entire record, including, but not limited to, depositions, interrogatories, stipulations and legal memoranda, for a decision on the merits.

The basic allegation of the amended complaint is that plaintiff was denied re-employment by the defendants solely because of her existing pregnancy. As stated previously, plaintiff alleges two separate theories of liability. The first cause of action alleges violations of her rights to "due process" and "equal protection" under the Fourteenth Amendment of the United States Constitution. The second cause of action alleges violations of her rights to be free from sexual discrimination as provided in Title

VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e)-2 and guidelines thereunder promulgated, principally found at 29 C.F.R. § 1604(a)-(f) and § 1604.10(a)-(b).

Initially plaintiff sought relief in the form of injunctive relief, back pay and reinstatement, and attorney's fees. Due to changes in her personal and professional life, plaintiff has informed the Court through her attorney that she abandons her claim for reinstatement and her position that defendants' subsequent job offer was not bona fide; and the only relief now sought in this case is as follows: (1) An Order of the Court declaring that the defendants violated plaintiff's rights in not renewing her contract; (2) An Order declaring the defendants liable for back pay to which she would have been entitled during the fall semester only, had she been permitted to teach until such time as a substitute was required; and (3) An Order directing the defendants to pay to the plaintiff court costs and attorney's fees.

Most of the factual allegations in the amended complaint are admitted in defendants' answer; however, liability, under any theory, is denied.

Since the provisions of the previously mentioned consent order have been complied with, there is no necessity for the taking of testimony and the case is ripe for decision. There is very little dispute as to the factual situation set forth in paragraphs 8, 9 and 10 of the amended complaint. The issue here involves mainly a question of law. After reviewing the entire record and studying the applicable law, the Court, pursuant to Rule 52 of the Federal Rules of Civil Procedure, makes the following:

FINDINGS OF FACT

1. Plaintiff holds a professional teaching certificate for the State of South Carolina and is certified in Spanish and other subjects. She was employed at Easley High School

by defendants on May 4, 1971 for the school year 1971-1972, and she served in that capacity teaching five classes in Spanish. Plaintiff performed with excellence as a teacher; and during February 1972, she signed the defendants' form letter of intent to be renewed for the next school year of 1972-73.

2. On April 4, 1972, plaintiff determined she was pregnant, and her personal physician anticipated delivery on or about November 6, 1972. Prior to the date for negotiating the contracts for school year 1972-73, plaintiff gave notice of her condition to the school administrators and engaged in conferences with her principal, making clear her preference to work as long as possible during the 1972-73 school year.

3. Christmas holidays were to be December 15, 1972 through January 1, 1973. The first semester was to end January 16, 1973 and the second semester was to commence January 17, 1973.

4. Barring any unforseen difficulties, which in fact she did not experience, in connection with delivery, plaintiff discussed with her principal the necessity of her being absent for approximately six weeks during the time that classes would be in session, her leave being anticipated to extend from approximately November 1, 1972 through January 1, 1973. The principal suggested that it might be possible for plaintiff to retain her teaching position with prearrangement for her maternity leave.

5. Plaintiff secured the consent of a Mrs. Carter, a person not certified for teaching Spanish, to act as a substitute during the period of plaintiff's absence with the aid of plaintiff's teaching materials and coaching. The principal agreed to this arrangement with the caveat that implementation of such an arrangement would be contingent on the approval by the school superintendent, Dr.

Curtis A. Sidden. The superintendent did not approve the plan; and consequently, plaintiff was offered no teaching contract for the school year 1972-73.

6. Plaintiff urged the superintendent to reconsider his position. She stressed the importance of her teaching second year Spanish to those she had taught the first year course. The superintendent did not change his position. At a regular meeting of the defendant Board of Trustees, some of plaintiff's students appeared and presented petitions, signed by 114 of plaintiff's Spanish students, on her behalf. The defendant Board discussed this matter and affirmed the superintendent's decision not to renew plaintiff's contract.

7. The reason defendants did not renew plaintiff's contract for the school year 1972-73 was because they believed a predicted long period of absence from the classroom would cause administrative problems for the school and break the continuity of teaching for the students. This policy is not expressed in the Teacher's Manual[1] given plaintiff prior to the incident in question or any other written form. However, it does appear that defendants' reasoning in the instant case is consistent with an unwritten policy followed by defendants. Defendant

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[1]The "Manual for Teachers 1971-72" sets forth a procedure for fixing the termination data of pregnant teachers already under contract and scheduled to deliver during the course of the contract year, as follows:

> "Maternity Leave
> The principal of the school shall decide when the presence of a pregnant woman (teacher, student or employee) is detrimental to the satisfactory operation of the school program. In all cases of maternity, women who are under contract with the Board of Trustees must in writing reply to the principal of the school or immediate superior official for termination of the contract as soon as pregnancy is determined. This termination should take effect not less than three (3) months prior to expected delivery date. Exceptions must be approved by the District Superintendent."

Sidden's testimony, wherein he refers to affidavits of various persons including school principals, reveals that applicants have been denied employment in the defendant school district because the applicant would not commit himself for the full academic year or it was anticipated the applicant would not be able to work the full contract year. (See Sidden's deposition beginning at page 39 and exhibit 3 attached thereto.) For example, several female applicants were not rehired for the next school year because their husbands planned to graduate from Clemson University in December, and they may be moving from the area. Defendants' policy is also evidenced by defendants refusal to consider a teaching position for a male applicant because he informed defendants he had applied for a civil service position and would take the position if and when he was accepted.

8. Defendants show no examples of denials of employment because of anticipated physical disabilties as in the instant case. However, the Court finds defendants actions in this case were made in good faith with legitimate interests for the educational system and its students in mind. In spite of defendants' good faith, defendants' action of non-renewal was directly attributable to plaintiff's then existing pregnancy.

9. Plaintiff has complied with all administrative procedures necessary to bring an action under Title VII. On or about August 24, 1972, plaintiff filed a complaint, charging employment discrimination against her because of sex, with the United States Equal Employment Opportunity Commission, which organization administers Title VII of the Civil Rights Act of 1962, as amended. After investigation, the director of the EEOC, Atlanta Regional Office, issued a document finding violations of 42 U.S.C. § 2000(e) relative to prohibitions against employment discrimination based on sex, as set forth in 29 C.F.R. §

1604.10(a) and (b). Defendants rejected the EEOC conciliation proposal, and plaintiff was advised she had the right to institute a civil action under Title VII. Having exhausted all administrative remedies, plaintiff thereafter commenced Civil Action No. 73-634 within the 90 day limitation.

CONCLUSIONS OF LAW

1. The Board of Trustees of Pickens County School District "A" and its agents are "employers" within the appropriate section of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(b). Prior to March 24, 1972 educational institutions were specifically exempt from the provisions of Title VII. However, the EEOC Act of 1972 amended Title VII to withdraw those exemptions. See 42 U.S.C. § 2000e-1. In this case the decision denying employment to plaintiff took place after March 24, 1972; therefore, the provisions of Title VII apply to plaintiff, a school teacher in a public school. *LaFleur* v. *Cleveland Board of Education*, 465 F.2d 1184, 1186 (6th Cir. 1972), affirmed 414 U.S. 632 (1974).

2. 42 USC. §2000e-2 provides, in part, as follows:

"(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The EEOC is the administrative body created by Title VII. It has issued guidelines and these administrative interpretations are entitled to "great deference" in applying the Act. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971). The pertinent guidelines in this case are as follows:

> "29 CFR §1604.10 - Employment Policies Relating to Pregnancy and Childbirth.
>
> (a) A written or unwritten employment policy or practice which excludes for employment applicants or employees because of pregnancy is a prima facie violation of Title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom are, for all job related purposes, temporary disabilities and should be treated as such under any health or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges; reinstatement, and payment under any health or temporary insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

3. The Court concludes that defendants' actions violated the above mentioned provisions of Title VII of the Civil Rights Act of 1964, as amended, and the EEOC guidelines promulgated thereunder. This conclusion is based on the finding that plaintiff was denied employment or renewal of her employment solely because of her pregnancy.

4. As revealed in Findings of Fact No. 7, defendants' policy of not hiring applicants or rehiring teachers for the next year when it was forseeable that they would be unable to complete the year, was not limited to females. However, the other denials mentioned in Findings of Fact

No. 7 did not involve physical disabilities, but rather the inability of the person to commit himself to an entire school year because he or she anticipated a different job offer or a relocation from the area of employment. The fact defendants denied plaintiff employment because of her pregnancy is the key to this case because that condition is so much a part of womanhood. Most other physical conditions are shared by men and women alike, in which case plaintiff would be precluded from asserting discrimination based on sex. The Court recognizes that there are physical conditions unique to men, such as a malfunction of the prostate gland. If plaintiff were a male who was not rehired because of an anticipated prostate operation, discrimination based on sex might still be argued. Since individuals of both sexes can suffer physical conditions unique to the sex, this Court finds logic in the position that neither should be allowed to assert discrimination on the basis of sex. However, pregnancy is a physical condition that has received special treatment in the law as it has developed.

5. Defendants argue that their actions were not based upon plaintiff's sex, but upon their desire to prevent a known interruption in the teaching and learning process. The Court is impressed with defendants' concerns; and, as stated previously, the Court finds that defendants did not intend to discriminate against the plaintiff because of her sex. However, the pertinent provisions of Title VII have been interpreted to proscribe acts that result in sexual discrimination, whether or not the employer acted in good faith. For example, *Gilbert* v. *General Electric Co.*, 74-1557 (4th Cir. June 27, 1975) involved a Title VII attack upon General Electric's employee disability benefits program which excluded pregnancy-related disabilities. The Fourth Circuit stated the purpose of Title VII as follows:

"The legislative purpose behind VII was to protect employees from any form of disparate treatment because of race, color, religion, sex or national origin or, as one commentator has stated it, 'to make employment decisions sex-blind, as well as color blind'." (cite omitted) (Sl. Op. at pg. 3).

In affirming the lower court's decision that General Electric's plan was violative of Title VII, Judge Russell, citing *Griggs*, *supra*, states: "It is of no moment that an employer may not have deliberately intended sex-related discrimination; the statute looks to 'consequences', not intent." Since pregnancy is a disability possible only among women the "consequence" of General Electric's disability program was a less comprehensive program of employee compensation and benefits for women employees than for men employees. Similarly, defendants' actions in the instant case resulted in the denial of a teaching job to plaintiff solely because of pregnancy.

6. The one exception to the statutory command of non-discrimination occurs in those certain instances ". . . where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ." 42 U.S.C. §2000e-2(e). However, this exception should be interpreted narrowly. 29 C.F.R. §1604.2(a) (1972) and see *Gilbert*, *supra*, footnote 22. The Court finds no support for the assertion that excluding pregnant women from teaching jobs is necessary to the normal operation of a school. It is common knowledge that pregnant teachers are able to teach and do teach in many instances for the greater portion of the period of the pregnancy.

7. Continuity of instruction as an objective of school officials is discussed at length in *LaFleur*, supra. *LaFleur* involved a successful attack on the mandatory School Board rules requiring pregnant school teachers to take maternity leave at specified times before expected delivery.

The attack was based on constitutional grounds rather than Title VII, which did not apply to state agencies and educational institutions at that time: therefore, continuity is discussed in terms of the state's interest.

"It cannot be denied that continuity of instruction is a significant and legitimate educational goal. Regulations requiring pregnant teachers to provide early notice of their condition to school authorities undoubtedly facilitate administrative planning toward the important objective of continuity. But, as the Court of Appeals for the Second Circuit noted in *Geen* v *Waterford Board of Education*, 473 F2d 629, 635:

'Where a pregnant teacher provides the Board with a date certain for commencement of leave . . . that value [continuity] is preserved; an arbitrary leave date set at the end of the fifth month is no more calculated to facilitate a planned and orderly transition between the teacher and a substitute than is a date fixed closer to confinement. Indeed, the latter . . . would afford the Board more, not less, time to procure a satisfactory long-term substitute.' (Footnote omitted.)"

LaFleur, *supra*, at pages 641 and 642.

The Supreme Court in LaFleur makes the point several times that early advance notice helps the school administrators plan for changes and thus serves the goal of continuity. In the instant case plaintiff gave notice in early April 1972 that she would probably be unable to work the first semester beyond November 1, 1972. Defendants cannot complain about the notice given here. In addition plaintiff found a substitute and took other steps to insure that her classes would be able to continue with minimum confusion in her absence. The record clearly indicates that the plaintiff's proposal for her maternity leave would not create the many interruptions asserted by defendants.

8. Since plaintiff had not yet entered into a contract for

the 1972-73 school year this case is distinguishable, as stressed by the defendants, from *LaFleur* and other cases where the inability to continue employment is made known after employment has begun. However, the statute and regulations quoted herein clearly state it is an "unlawful employment practice" under Title VII to practice sexual discrimination against applicants as well as existing employees. Additionally, plaintiff is not an "applicant" in the usual meaning of that term. She was working for defendants at the time their decision not to rehire her was made, and she had already proven herself to be an excellent teacher as defendants admit. Defendants would have this Court penalize plaintiff because she advised the defendants of her condition when she first learned of its existence, rather than waiting until it became obvious and until after she had the opportunity of signing a contract for 1972-73. If plaintiff had made her pregnancy known after signing the contract, it appears, from defendant Sidden's deposition, that plaintiff would have been allowed to continue with her work as long as she desired within reason, even though the Teacher's Manual calls for termination in a different manner. (See Sidden's deposition pp 25 and 26, and the affidavits attached thereto as exhibit #3).

9. Citing *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), defendants assert not every classification concerning pregnancy is a sex-biased classification; and absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the member of one sex or the other there can be no valid claim of sex discrimination. In *Aiello* the Supreme Court upheld a legislatively created social welfare program for private employees in which a differentiation between pregnancy related and other disabilities was made. *Aiello* dealt with a constitutional attack under the

Equal Protection Clause of the Fourteenth Amendment and the Court applied the customary standards in testing legislation under the Equal Protection Clause. It is not necessary that this Court apply those same constitutional standards because the decision here is based on a Title VII violation. Defendants argue that the approach to actions under the Constitution and Title VII are not distinguishable, but the Fourth Circuit in *Gilbert*, *supra*, has held otherwise.

> "In this case, on the contrary, the issue is not whether the exclusion of pregnancy benefits under a social welfare program is 'rationally supportable' or 'invidious' but whether Title VII, the Congressional statute, in language and intent, prohibits such exclusion. Accordingly, as the Court in *Wetzel* v. *Liberty Mutual Insurance Co.*, supra, aptly observed, 'our case is one of statutory interpretation rather than one of constitutional analysis'. There is a well-recognized difference of approach in applying *constitutional* standards under the Equal Protection clause as in *Aiello* and in the statutory construction of the 'sex-blind' mandate of Title VII. To satisfy constitutional Equal Protection standards, a discrimination need only be 'rationally supportable' and that was the situation in *Aiello*, as well as in *Reed* and *Frontiero*. The test in those cases was legislative reasonableness. Title VII, however, authorizes no such 'rationality' test in determing the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in conditions of employment. It is not concerned with whether the discrimination is 'invidious' or not. It outlaws all sex discrimination in the conditions of employment." (Cite omitted). Sl. Op. pp. 13 and 14.

10. The Court concludes the denial of employment to plaintiff was a violation of her rights under Title VII. This is the real question in this case. In keeping with the general policy in the Federal Courts to avoid unnecessary constitutional questions, the Court makes no decision on the issue of a possible constitutional violation of plaintiff's

rights.

11. Since plaintiff's rights under Title VII have been violated she is entitled to back pay for the fall semester of 1972 up until November 1, 1972, the date plaintiff and her physician predicted that a substitute would be necessary. In addition, the Court pursuant to 42 U.S.C. §2000e-5(k), directs defendants to pay plaintiff's attorney's fee in the amount of One Thousand Two Hundred and No/100 ($1,200.00) Dollars.

AND IT IS SO ORDERED.

ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

January 22nd, 1976
Columbia, South Carolina

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Civil Action No. 75-143

ANN MITCHELL,

Plaintiff,

versus

BOARD OF TRUSTEES OF PICKENS COUNTY SCHOOL DISTRICT "A", A BODY POLITIC AND CORPORATE; DR. CURTIS A. SIDDEN, SUPERINTENDENT OF EDUCATION FOR PICKENS COUNTY SCHOOL DISTRICT "A", IN HIS OFFICIAL CAPACITY ONLY, AND THE FOLLOWING MEMBERS OF THE BOARD OF TRUSTEES: B. J. SKELTON, RAY YOUNGBLOOD, TOM HENDRICKS, GIBSON SHEALY, KEN SMITH, ALLISON DALTON, NANCY WELBORN, DAN WINCHESTER AND GEORGE C. HAGOOD, IN THEIR RESPECTIVE OFFICIAL CAPACITIES ONLY AS MEMBERS OF SUCH BOARD; ALL OF THE ABOVE JOINTLY AND SEVERALLY SUED,

Defendants.

ORDER

This matter is before the Court upon defendants' motions seeking amendments to and relief from this Court's Order filed January 22, 1976.

Rule 52(b) of the Federal Rules of Civil Procedure provides, in part, that "Upon motion of a party made not later than ten days after entry of judgment the Court may amend its findings or make additional findings and may amend the judgment accordingly."

Defendants seek amendments in the form of (1) additions and deletions of certain words to the first sentence of Findings of Fact No. 7 and (2) additional findings of fact. After reviewing the record, considering the defendant's requests and the plaintiff's objections thereto, the Court

feels that certain modifications are appropriate for the purposes of clarification and in keeping with this Court's desire that its Order convey a correct understanding of the factual issues determined by the Court. Therefore, *the first sencence only of Findings of Fact No. 7 is hereby amended to read as follows:*

> "7. The reason defendants did not renew or offer to renew plaintiff's contract for the fall semester of school year 1972-73 or the entire school year 1972-73 was because they believed a predicted long period of absence from the classroom would break the continuity of teaching for the students."

In addition, *Findings of Fact No. 8 is hereby amended in its entirety* to read as follows:

> "8. Defendants show no examples of denials of employment because of anticipated physical disabilities as in the instant case. However, the Court finds defendants' actions in this case were made in good faith with legitimate interests for the educational system and its students in mind. It was the wish of the defendants to return plaintiff to her teaching responsibilities as soon as such could be accomplished with minimal disruption of instructional continuity. A logical breaking point in the instructional process is between the first and second semesters. Two separate efforts were made to achieve this end. First, the deposition of plaintiff's principal, J. Milton Butler, taken October 27, 1972 in Civil Action No. 72-1123 reveals his attempts to hire a Spanish teacher for the first semester so that plaintiff could return to that position the second semester. Secondly, plaintiff was offered, in January 1972, a teaching job as a reading teacher beginning the second semester; however, plaintiff refused this offer. In spite of defendants' good faith, defendants' action of non-renewal was directly attributable to plaintiff's then existing pregnancy."

Defendants make the additional motion for relief from final judgment to Rule 60(b) (6):

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment."

Defendants contend the relief sought is justified because this Court's Order is essentially bottomed on the June 27, 1975 Fourth Circuit Opinion in *Gilbert* v. *General Electric Co.*, 519 F. 2d 661, which is on appeal. It is plaintiff's contention that there is a possibility the Supreme Court's decision would not be directly on point resulting in more confusion and more delay.

The Court feels that the Supreme Court may well decide controlling questions. Gilbert has been argued in the Supreme Court since defendants' motion and plaintiff's reply memorandum were filed; therefore, the decision will probably be forthcoming in the near future. In addition, it is significant that the relief to which plaintiff is entitled under this Court's Order is back pay for only two months. We are not dealing with a situation involving reinstatement, the delay of which would be burdensome and prejudicial to plaintiff. The Court concludes relief from the judgment is justified pending the Supreme Court's decision in Gilbert.

For the reasons stated above, defendants' motion to amend findings is granted with certain modifications; and defendants' motion for relief from judgment is granted pending the Supreme Court's decision in *Gilbert.*

AND IT IS SO ORDERED.

ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

April 6th, 1976
Greenville, South Carolina

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Civil Action No. 75-143

ANN MITCHELL,

Plaintiff,

versus

BOARD OF TRUSTEES OF PICKENS COUNTY SCHOOL DISTRICT "A", A BODY POLITIC AND CORPORATE; DR. CURTIS A. SIDDEN, SUPERINTENDENT OF EDUCATION FOR PICKENS COUNTY SCHOOL DISTRICT "A", IN HIS OFFICIAL CAPACITY ONLY, AND THE FOLLOWING MEMBERS OF THE BOARD OF TRUSTEES: B. J. SKELTON, RAY YOUNGBLOOD, TOM HENDRICKS, GIBSON SHEALY, KEN SMITH, ALLISON DALTON, NANCY WELBORN, DAN WINCHESTER AND GEORGE C. HAGOOD, IN THEIR RESPECTIVE OFFICIAL CAPACITIES ONLY AS MEMBERS OF SUCH BOARD; ALL OF THE ABOVE JOINTLY AND SEVERALLY SUED,

Defendants.

ORDER

This action was originally brought when the defendants, after being informed of plaintiff's pregnancy, failed to rehire or renew plaintiff's teaching contract for the entirety of the 1972-73 school year, allegedly in violation of her rights to due process and equal protection under the 14th Amendment of the United States Constitution and her statutory rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-2 and the administrative guidelines promulgated thereunder, 29 C.F.R. §1604(a)-(f) and §1604.10 (a)-(b). This Court issued an Order on January 22, 1976 finding that the defendants' action of non-renewal was directly attributable to plaintiff's then existing pregnancy and violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-2 and 29 C.F.R. §1604.10.

Because of this finding, the Court found it unnecessary to reach the constitutional issues raised by the plaintiff. On December 7, 1976 the United States Supreme Court decided the case of *General Electric Company* v. *Gilbert*, 429 U.S. 125 (1976) in which it reversed the decision of the Fourth Circuit Court of Appeals, *Gilbert* v. *General Electric Company*, 519 F. 2d 661 (4th Cir. 1975), upon which this Court had placed some reliance in its Order. That reversal has resulted in the present motion by the defendants for reconsideration.

Gilbert v. *General Electric Company* concerned the claims of pregnant employees of the defendant's Salem, Virginia plant who applied for and were denied disability benefits when each one became pregnant. The disability plan which the company provided paid weekly non-occupational sickness and accident benefits to employees but exempted pregnancy. In reversing the Fourth Circuit, the Court held that the exclusion of pregnancy was not sex discrimination and consequently not a violation of Title VII, since all employees were protected to the same extent against those risks covered and that there was no discriminatory effect because the benefits paid out to female employees were at least as high as those paid to male employees.

The defendants argue that this Court should reverse its prior decision since (1) it did not consider those constitutional decisions on sex discrimination but merely found a violation of Title VII in accord with the reasoning of the Fourth Circuit in *Gilbert* and (2) in considering those cases, there is plainly no gender-based discrimination or gender-based effect.

This Court, in its January 22, 1976 Order, following the reasoning of the Fourth Circuit in *Gilbert*, refused to apply the constitutional standards under the equal protection clause set forth in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974)

to this case since the "decision here is based on a Title VII violation." The Supreme Court rejected this conclusion stating that the similarities between the congressional language of §703(a) (1), 42 U.S.C. §2000(e)-2(a) (1), and those court decisions construing the equal protection clause particularly the term "discrimination", made *Geduldig* "quite relevant in determing whether or not the pregnancy exclusion did discriminate on the basis of sex." 429 U.S. at 133.

> Since it is a finding of sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under Section 703(a) (1), *Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not gender-based discrimination at all.

429 U.S. at 136. While the Court was concerned with the application of §703(a) (1) and not §703(a) (2) and both provisions are relied upon in the present case, it is nevertheless apparent that a finding of sex-based discrimination or discriminatory effect is, under those cases and the language of the statute itself, a necessary element in finding an unlawful employment practice under §703(a) (2). Although the language used in subsection 2 varies somewhat from subsection 1, the basic premise of §2000(e)-2, as noted by its title, is discrimination. Although the various means by which discrimination is accomplished are treated by the two subsections separately, the overall concept is the disparate treatment of individuals because of race, color, religion, sex or national origin - in short, discrimination. In light of *Gilbert* and the statutory language it construed, the defendants unwritten policy of the non-renewal of teacher contracts where a predicted period of absence is indicated, has not been shown to constitute gender-based discrimination or to be gender-based in effect.

In its Order of January 22, 1976, this Court stated that although the defendants did not intend to discriminate against the plaintiff because of her sex, the "consequences" of their action was to deny plaintiff re-employment solely because of her pregnancy. *Gilbert* recognized that a prima facie violation of Title VII can be established upon proof that the effect of an otherwise facially neutral plan or classification is to discriminate on the basis of sex. 429 U.S. at 136-37. The Court noted that in a challenge under §703(a) (2), such as that present here, "a prima facie case of discrimination would be established if, even absent proof of intent, the consequences of the test were 'invidiously to discriminate on the basis of racial or other impermissible classification,' *Griggs* v. *Duke Power Company*, 401 U.S. 424, 431 (1971)". The Court nevertheless concluded that neither gender-based discrimination nor gender-based effects had been shown, and, therefore, no violation of §703(a) (1) had been proven. The plaintiff here has likewise failed to prove a violation of §703(a) (1) or (2).

Plainly, the defendants' policy of refusing to rehire or renew a teacher's contract for the following school year where there will be a foreseeable period of absence is facially non-discriminatory since it is equally applicable to both males and females and is not limited to specific reasons for the absence. It has so been applied as noted by the instances of its application in the Court's previous order. Those instances, however, did not involve a physical disability. Plaintiff contends that this factor coupled with the physical disability to which the policy has been applied - pregnancy, indicates that the policy has a gender-based discriminatory effect. Since men can equally have sex related physical disabilities such as prostrate gland malfunctions or more voluntary operations such as vasectomies, it is not particularly significant that the

defendants' policy has only been applied to plaintiff's pregnancy since she has not shown that given the presence of a physical disability uniquely affecting men, the defendants would not invoke the policy. As noted in the Court's earlier Order, it has been applied to men when the reasons for the absence did not relate to a physical disability. Moreover, as noted in *Gilbert*, it has not been shown that the consequences of this policy are "invidiously to discriminate" on the basis of sex. 429 U.S. at 137. There, the Supreme Court refused to find discriminatory effect "simply because women disabled as a result of pregnancy do not receive benefits." 429 U. S. 139. Likewise, the fact that the only instance in which a physical disability has arisen is that of pregnancy does not show that the defendants facially neutral plan invidiously discriminates against women. Nor do the EEOC guidelines require a different conclusion.

Plaintiff relies upon an EEOC guideline which states that

> A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

29 C.F.R. §1604.10(a) (1976). The Supreme Court in *Gilbert* weakened the effect of the previous "great deference" to administrative guideline rule, *See Griggs* v. *Duke Power Company*, 401 U.S. 424, 433-34 (1971), by noting that since no congressional authority had been given to the EEOC to promulgate rules or regulations pursuant to Title VII and since guidelines, not having the force of law, are accorded less weight than are regulations, that "deference" is to be guided by several factors bearing on the particular guideline's persuasiveness. 429 U.S. at 140-42. Using this standard, the Court found the particular guideline in question relating to pregnancy related disabilities, to be lacking in persuasiveness. Finding no reason to attach particular significance to the guideline,

the Court fell back on traditional 14th amendment judicial construction of the term "discrimination" and concluded that without further congressional explanation of the statutory language, "we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant . . . ." 429 U.S. at 145. The guideline at issue here is merely that, a guideline, and this Court attaches no particular weight to it.

While the *Gilbert* court noted that even though a distinction which is not sex related on its face could be a violation of the equal protection clause and of Title VII if it is a "pretext designed to effect an invidious discrimination against the members of one sex", no sex related distinctions are present here, the defendants' policy is applicable to all absences, whether gender related physical disability ones or not.

Finally, Plaintiff contends that if this Court does turn to constitutional cases for analysis in this Title VII case, it should consider the case of *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974).

LaFleur concerned the constitutionality of mandatory maternity leave policies requiring pregnant school teachers to take maternity leave at specified times before expected delivery. The Supreme Court held that the mandatory employment termination provisions at various arbitrary times violated the due process clause of the 14th amendment since they established irrebuttable presumptions concerning the physical capacity of teachers to work after a given period of time. The due process clause required more individualized determinations and the sweep of the mandatory leave policies was impermissibly broad. However, in the present case the School Board's written mandatory leave policy was abrogated before the institution of this law suit and the Court is not now faced with a

policy which creates an irrebuttable presumption. Rather, it is a policy designed to insure the continuity of the instructional process without regard to the reason for the absence and without setting up a presumption of unfitness for any reason.

Having therefore reconsidered this Court's previous decision, the Court is of the opinion that in light of *Gilbert* and those other constitutional cases considering discrimination, in the context of Title VII or otherwise, the defendants' policy does not constitute gender-based discrimination nor has plaintiff made the necessary showing of gender-based effects.

Accordingly, the Clerk shall withdraw the prior judgment entered for plaintiff and enter judgment for the defendants.

AND IT IS SO ORDERED.

ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

July 27th, 1977
Columbia, South Carolina

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2385

ANN MITCHELL,

Appellant,

versus

BOARD OF TRUSTEES OF PICKENS COUNTY SCHOOL DISTRICT "A",

Appellees.

ORDER

Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Phillips for a panel consisting of Judge Haynsworth, Judge Phillips, and Judge Hoffman (U.S.D.J.).

For the Court,

/s/ William K. Slate,II
CLERK

June 29, 1979

No. 79-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

BOARD OF TRUSTEES OF PICKENS COUNTY SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

ANN MITCHELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1979

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v.

ANN MITCHELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In a number of respects, petitioners' statement of the case distorts the facts. Respondent therefore presents this statement to give the Court a more accurate view.

Respondent Ann Mitchell was employed as a high school teacher of Spanish during the 1971-72 school year by Pickens County (South Carolina) School District "A". In February 1972, she signed a letter of intent stating her desire for renewal of her contract for the following

school year. In April 1972, she discovered that she was pregnant, and so informed the principal of her school. She told the principal that she still desired renewal of her contract, but would need approximately 6 weeks' leave beginning in November to have her baby. Although the principal was agreeable to this arrangement, and a suitable substitute teacher was found who was willing to replace respondent for the period of her absence, the Board of Trustees of the School District refused to renew her contract. It is undisputed that respondent was an excellent teacher, and the sole reason for the nonrenewal was her pregnancy.

At the time of these events, the School District's policy manual contained the following provision:

> The Principal of the school shall decide when the persence of a pregnant woman (teacher, student, or employee) is detrimental to the satisfactory operation of the school program. In all cases of maternity, women who are under contract with the Board of Trustees must in writing apply to the principal of the school or immediate superior official for termination of contract as soon as pregnancy is determined. This termination should take effect not less than three (3) months prior to the expected delivery date. Exceptions must be ap-approved by the District Superintendent.

The court below found that plaintiff was required by this provision to notify her principal "as soon as pregnancy [was] determined," and it was that early notice that led to the nonrenewal of her contract.[1] Nevertheless, in their

[1] The Court of Appeals wrote:

> While the notification requirement critical to this regulation is literally related to "termination" of ongoing contracts rather than to "non-renewal" of contracts for succeeding years, the duty to notify is literally addressed to any teacher "under contract" who determines she is pregnant. There is no question on the record of its intended application to Mitchell's determination and disclosure of her pregnancy; and of course both she and the board so acted upon it, with the results that gave rise to this litigation. This regulation was revoked by the school board during this litigation.

(Pet. App. 3a.)

petition for certiorari, petitioners contend that respondent was required to disclose her pregnancy not because of the maternity policy quoted above, but because of a separate policy requiring a teacher to notify his or her principal when he or she finds it "necessary" to be "absent from school 'for any reason.'" (Pet. 5-6.) This contention is contrary to the finding of the court of appeals, and was raised for the first time in petitioners' petition for rehearing in the court below. Moreover, even in their petition for rehearing, petitioners conceded that "appellant's subjective reason for giving notice was her reading of the 'pregnancy policy' . . . ." In any event, it was only the maternity policy, and not the general policy cited by petitioners, that required respondent to give notice "as soon as pregnancy is determined," rather than waiting until after she had received a new contract.

Petitioners sought to justify their refusal to grant respondent a new contract on the basis of an "unwritten policy" that no teacher would be given a contract if it was known that the teacher would be unable to work the entire school year. But only pregnant teachers were required, because of the maternity policy, to notify school authorities of their condition as soon as it became known. A teacher who expected to be temporarily absent in the following year for some other medical reason, such as anticipated surgery, would not have to disclose that fact until after a new contract was granted. And once such a teacher was employed, he or she would be entitled to take temporary sick leave without sacrificing his or her job. Thus, as the District Court found, no teacher

had ever previously been denied a new contract because of an anticipated temporary absence of this kind.[2]

The District Court initially held that the policies applied to respondent in this case, while neutral on their face, had the effect of discriminating against pregnant women, and were therefore unlawful under Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1976). After this Court decided *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the court reconsidered its original decision and, relying on *Gilbert*, entered judgment for petitioners. Respondent then appealed to the Fourth Circuit.

While the appeal was pending, this Court decided *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), which clarified the holding in *Gilbert*. The Court of Appeals held that *Satty* controlled this case, and that in light of that decision the policies in issue here were, at least *prima facie*, unlawful, unless they could be justified as serving some "business necessity." The court therefore remanded the case to the District Court to consider the "business necessity" issue. The crux of the court's reasoning is found in the following paragraph from its opinion:

> Within the *Satty* analysis, as applied to the facts found by the district court in this case and undisturbed in its judgment before us, the defendants' policy as applied clearly also imposed upon women school teachers a substantial burden that their male counterparts need not suffer. Women teachers alone were required by regulation to give advance notice of any anticipated absence of extended duration during an ensuing year. While it may be factually inferable that any male whose comparable anticipated absence was voluntarily disclosed either by himself or others would similarly have been denied renewal of contract, no official obligation of disclosure was laid upon men, and the record is devoid of evidence that anticipated absences for reasons of physical disability were ever used to deny renewal to men. The policies in combination clearly deprived women, including this plaintiff, of an "employment opportunities"—renewal for another year—and "adversely affect[ed their] status as . . . employee[s]" "because of [their] sex" within the meaning of § 703(a)(2). The policy and its consequences in application are not only indistinguishable in substance from those held violative of § 703(a)(2) in *Satty*, but also from those found *prima facie* violative in *Pennington* v. *Lexington School District 2*, 578 F.2d 546 (4th Cir. 1978), another post-*Satty* decision of this Court.

Pet. App. 9a.

[2] The district court found in its first opinion:

> . . . [T]he other denials [of new contracts] . . . did not involve physical disabilities, but rather the inability of the person to commit himself to an entire school year because he or she anticipated a different job offer or a relocation from the area of employment.

(Pet. App. 8b-9b.)

ARGUMENT

The petition for certiorari seeks to present two questions for review by this Court. The first question is whether, to rebut respondent's *prima facie* showing of discrimination in this case, petitioners must prove that their employment policies were justified by business necessity, as the court below held, or whether, as petitioners contend, they need only "articulate some legitimate nondiscriminatory reason" for those policies. The second question is whether the finding in this case that petitioners' policies had a disparate impact on women was adequately supported by the record, despite the absence of statistical evidence.

Both of these issues are controlled by previous decisions of this Court and were correctly decided below. They do not, therefore, warrant review here.

I.

Petitioners' arguments with respect to the first issue proceed from the erroneous premise that this is a "disparate treatment" case—i.e., that the Court of Appeals found that respondent was intentionally denied employment because of her sex. In fact, however, this is a "disparate impact" case. The court below held that in this case, as in *Satty*, the petitioners' employment policies, while neutral on their face, had the effect of imposing on women greater burdens than on men.[3]

The distinction is explained in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977):

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[3] The Court of Appeals held that the District Court's "first conclusion of a *prima facie* Title VII disparate impact violation was correct." (Pet. App. 8a.) Petitioners incorrectly characterize the District Court's first decision as based on a finding of disparate treatment rather than disparate impact. (Pet. 8 n.9.) In that decision, the District Court concluded that the Board's policies, though not intentionally discriminatory, had disproportionate consequences for women:

> Defendants argue that their actions were not based upon plaintiff's sex, but upon their desire to prevent a known interruption in the teaching and learning process. The Court is impressed with defendants' concerns; and, as stated previously, the Court finds that defendants did not intend to discriminate against the plaintiff because of her sex. However, the pertinent provisions of Title VII have been interpreted to proscribe acts that result in sexual discrimination, whether or not the employer acted in good faith. For example, *Gilbert* v. *General Electric Co.* . . . involved a Title VII attack upon General Electric's employee disability benefits program which excluded pregnancy-related disabilities.
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> * * * * *
>
> Since pregnancy is a disability possible only among women the "consequence" of General Electric's disability program was a less comprehensive program of employee compensation and benefits for women employees than for men employees. Similarly, defendants' actions in the instant case resulted in the denial of a teaching job to plaintiff solely because of pregnancy.

(Pet. App. 9b-10b.)

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See, *e.g.*, *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66.
>
> * * * *
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. Compare, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-432, with *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-806. See generally B. Schlei & P. Grossman, Employment Discrimination Law 1-12 (1976); Blumrosen, Strangers in Paradise: *Griggs* v. *Duke Power Co.* and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59 (1972).

In a disparate impact case, the plaintiff must first show that a challenged employment practice "work[s] in fact disproportionately to exclude women from eligibility for employment . . . ." *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977). See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971). The plaintiff need not make any showing of discriminatory intent. *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 328. Once the plaintiff has established disproportionate effect, the defendant has the burden of showing a "business necessity" for the challenged practice. *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 143 (1977). Accordingly, the Court of Appeals

remanded this case to the District Court for a determination of the "business necessity" issue.

Petitioners contend that they may rebut respondent's *prima facie* case by advancing a "legitimate nondiscriminatory reason" for their policy. This standard, however, is relevant only to the determination of *disparate treatment* under Section 703(a)(1) of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1). See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 796, 802 (1973). It has no bearing at all on cases of *disparate impact* under Section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2). *Nashville Gas Co.* v. *Satty, supra*, 434 U.S. at 143. When a disparate impact is alleged, the rebuttal of a *prima facie* case requires a showing of "business necessity."

The two tests serve entirely different purposes. In a disparate treatment case, the issue is the employer's motive—i.e., whether the challenged action was based on the employee's race, religion, nationality, or sex, or whether it was motivated by a "legitimate nondiscriminatory reason." See *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). Thus, a *prima facie* case of disparate treatment can be rebutted if the employer can articulate a "legitimate nondiscriminatory reason" for the challenged action. The burden then shifts to the employee to show that this purported reason was a mere pretext. See *McDonnell Douglas Corp.* v. *Green, supra*, 411 U.S. at 804-05.

In a disparate impact case, on the other hand, the employer's motive is irrelevant. The issue is the impact of the challenged employment policy on women or minorities. If the policy is shown to affect such groups disproportionately, it is *prima facie* unlawful, unless it can be justified on the basis of business necessity. See *Dothard* v. *Rawlinson, supra.*

Petitioners assert that there is a conflict between the decision below and decisions of this Court and the Court of Appeals for the District of Columbia Circuit. But the decisions allegedly in conflict with the present one all involved disparate treatment rather than disparate impact. *Board of Trustees of Keene State College* v. *Sweeny*, 439 U.S. 24 (1978); *Furnco Construction Co.* v. *Waters, supra*; *Chalk* v. *Secretary of Labor*, 565 F.2d 764 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 945 (1978). There is no conflict. The Court of Appeals employed the proper standards for cases of disparate impact.

II.

Petitioners contend that the evidence in this case did not establish that the challenged employment policies did in fact have a disproportionate impact on women. This Court, of course, does not normally grant certiorari to review factual issues. In any event, petitioners' contention is without merit.

Although there was no statistical evidence available in this case,[4] the court of appeals concluded that petitioners'

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[4] The reason for the absence of statistical evidence is that no records existed from which such statistical data could be derived. This is made clear in the testimony of the District Superintendent. When asked how often the policy precluding employment of a teacher who anticipates a period of absence for part of the school year had been applied in the past, the Superintendent testified:

> A. Well, to my knowledge this is the first objection to the policy. Perhaps I ought to explain that the initial recommendation for employment comes from the Principal, and the Principal, as far as I know, works these kinds of problems out prior to their coming to my attention.
>
> Q. So if this is the first objection, there must have been other instances, then, when this policy was employed?
>
> A. I'm sure there have been, yes.
>
> Q. How often during the term of a year, on the average, is this policy employed in your school district?
>
> A. Well, this I really have no way of knowing, because the Principals by and large take care of these and many of

purported policy of denying contracts to a teacher who anticipated a temporary absence during the contract year, combined with its policy of requiring pregnant women to disclose their condition as soon as it became known, "would necessarily impact disproportionately upon women." (Pet. App. 7a.) As the court noted, "the record is devoid of evidence that anticipated absences for reasons of physical disability were ever used to deny renewal to men." (Pet. App. 9a.) Even if petitioners' policy would require denial of a contract to a male teacher who voluntarily disclosed that he expected to be absent because of surgery or some other medical occurrence during the contract year, no such disclosure was required by the School District's rules, and in any event, such a situation would be extremely rare. On the other hand, immediate disclosure of pregnancy was required, and pregnancy, of course, is a common occurrence which affects only women. The court's conclusion that these policies had a disparate impact on women is therefore not only correct but self-evident.

Contrary to petitioners' argument, there is no requirement that disparate impact be shown statistically. In *Satty*, for example, disparate impact was inferred, as it was here, from the fact that pregnancy was treated less favorably than other physical disabilities. As the court below observed:

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them never come to my attention. (Deposition of Curtis Sidden, p. 95.)

In light of this testimony, petitioners' assertion that respondent was the only woman ever denied contract renewal because of pregnancy is grossly misleading. While no one knows how often this has occurred in the past, it can only be assumed that it occurred quite frequently. Respondent is merely the first person to challenge the policy. Indeed, the same year that respondent was denied contract renewal, two other female teachers were pregnant and expected their babies in the next school year. These teachers did not apply for renewal—and therefore were not technically denied renewal—but they were clearly ineligible for renewal under petitioners' policies. That is probably why they did not bother to apply.

> "To require statistical proof involving a significant sample of actual applications of a policy to establish its disparate impact would always preclude the claim of a 'first impactee.' Title VII of course cannot be read to yield such a result."

Pet. App. 7a n.7.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 26, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-507

BOARD OF TRUSTEES OF PICKENS COUNTY SCHOOL DISTRICT, ET. AL.,

Petitioners,

versus

ANN MITCHELL,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I.

The Brief in Opposition gives the impression that Respondent was subjected to a decision-making process premised on the pregnancy policy which it quotes and discusses in some detail.[1] One of the critical factual disputes at trial was whether this pregnancy policy or the School District's anticipated absence policy had been the basis for decision in Mitchell's case.[2] The district court

[1] Br., at 2-3.

[2] In fact, the record showed that the pregnancy policy was a dead letter, thoroughly ignored by School District authorities. In some cases teachers taught up to a few days before delivery. See A. 158-171.

resolved that factual dispute in the School District's favor on substantial and virtually uncontradicted evidence.[3] The court of appeals did not overturn the district court's finding of fact as "clearly erroneous." *Zenith Corp. v. Hazeltine*, 395 U. S. 100 (1969). Therefore, it stands on appeal to this Court.

Likewise, the district court did not accept Respondent's factual contention that men were not required by the School District to report anticipated absences. Had it done so, Respondent would surely give a specific citation to this finding of fact. Respondent's statement that "a teacher who expected to be temporarily absent in the following year for some other medical reason, such as anticipated surgery, would not have to disclose that fact until after a new contract was granted"[4] is mere assertion on her part. The district court made no such finding, nor did Respondent introduce evidence of a single actual case to support this contention. Again, if evidence of an actual case existed on the record, Respondent assuredly would not be slow to cite chapter and verse in support of the assertion.

Significantly, the Respondent places almost no reliance on the district court's findings. Her references to the findings of the "court below" are to the opinion of the court of appeals.[5] But the district court, not the court of appeals, was the trier and finder of fact in the case. See *Zenith Corp. v. Hazeltine, supra*; *United States v. City of Bellevue*, 473 F.2d 473, 475 (8th Cir. 1973); *Phoenix Assurance Co. v. Singer*, 331 F.2d 10, 11 (8th Cir. 1964); Fed. R. Civ. P., Rule 52(a). The district court's findings were not set aside by the court of appeals. Therefore, Respondent is simply not at liberty to revive her factual theories after losing on the facts in the district court and

[3] See Pet., at 6, n.7.
[4] Br., at 3.
[5] See Br., at 2-3.

then, by an ingenious twist of rhetoric, assert that the School District's petition asks this Court to review factual issues.[6]

II.

For the reasons given in the Petition, we stand on our characterization of the district court's initial decision as one based on disparate treatment.[7] The Respondent's basic theory of the case from the very beginning of the district court action was that *she* had been *treated* differently than she otherwise would have been solely because of her pregnancy. Likewise, the reasoning behind the district court's initial Title VII opinion was that Mitchell, *as an individual*, would have been *treated* differently, but for her pregnancy. The reasoning had nothing to do with some claimed impact of the anticipated absence policy on women in general; it was bottomed on the treatment of Mitchell, and Mitchell alone, as a result of its application in her case. This seems to us too clear to be gainsaid.

In its second opinion, the district court rejected both the disparate treatment argument and the disparate impact argument as unsupported by the facts. Without purporting to disturb the district court on its fact finding, the court of appeals reversed on what we contend are erroneous legal theories. For the reasons set forth in our Petition, we believe these legal errors to be of sufficient importance and magnitude to warrant review by this Court.

[6] See Br., at 9.
[7] See Pet., at 8, n.9; 12, n.12.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and in this reply brief, the writ prayed for should be granted.

Respectfully submitted.

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